



National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Re: Freedom of Information Act Appeal - EPA-R3-2019-008589

To Whom it May Concern,

The Delaware Riverkeeper Network (“DRN”) is writing to appeal the Environmental Protection Agency’s (“EPA”) response and lack thereof to Freedom of Information Act (“FOIA”) request: EPA-R3-2019-008589. By failing to grant DRN’s FOIA request within the time limits set forth by 40 C.F.R. §2.104(a) and by withholding some responsive records to our request, EPA violated the Freedom of Information Act as its egregiously delinquent and inadequate response rises to the level of a denial.

DRN is a nonprofit organization made up of members and volunteers who reside and work throughout the Delaware River Watershed, including Pennsylvania, New Jersey, Delaware, and New York. DRN works in these states and on the federal level on behalf of its membership on issues, actions, legislation, policies, programs, litigation and decisions that impact the health of the Delaware River Watershed waterways and the citizens who use and benefit from them.

On September 3, 2019, DRN submitted a FOIA petition to the EPA, pursuant to 40 C.F.R. §2.102, seeking¹:

All records in the EPA’s possession regarding the Bishop Tube Site located at 1 Malin Road, Malvern, PA from January 1, 2005 to September 3, 2019, including all correspondence, reports, studies, documents, internal and external communications, and emails between the Department of Environmental Protection and the Environmental Protection Agency, and specifically relating to a complaint sent by resident “John Preston” to the EPA regarding the Bishop Tube Site, including all documents, internal and external communications and emails between the concerned resident, the Department of Environmental Protection, and the Environmental Protection Agency. This request includes all attachments mentioned in any documents.

¹ On October 3, 2019, DRN sent a second FOIA request to EPA. EPA combined the October 3, 2019 request with the September 3, 2019 request. Specifically, the request was modified to include the “complaint sent by resident “John Preston” to the EPA regarding the Bishop Tube Site, including all documents involving, investigating and/or responding to the complaint, whether from PADEP, EPA or other source, and internal and external communications and emails between the concerned resident, the PA Department of Environmental Protection, and the Environmental Protection Agency. This request includes all attachments mentioned in any documents.”

If other records exist in your possession not specifically mentioned above, but pertain to this request, we intend those to be within the scope of this request.

See Exhibit A. On November 25, 2019, The EPA requested, and DRN agreed to, an extension up to December 13, 2019. *See Exhibit B.* On April 17, 2020, the EPA informed DRN that they “just finished [a] second review of the documents” and that it was submitted to a supervisor for final review. EPA acknowledged that once the supervisor “completed his overview [they would] submit it for review by [their] legal staff.” In stating so, the EPA requested, yet another, one-month extension to finalize the release of the documents and cited that the request has been “very complicated” to fulfill. *See Exhibit C.* DRN kindly agreed to the extension request and stated that the documents should be submitted no later than May 17, 2020. On May 4, 2020, the EPA, for the third time, requested yet another extension, this time in the form of two-weeks in order for their legal staff to complete the review. DRN agreed to the extension so long as “it will be completed on or before May 30, 2020.” *See Exhibit D.* On May 14, 2020, EPA stated, via phone call, that the COVID-19 pandemic has slowed down the EPA’s response time. Three days prior to the agreed upon fulfillment date, the EPA stated that the review process is “almost done” and requested a fourth extension for one month up to June 30, 2020. DRN denied EPA’s extension request and stated that unless the documents are received by June 15, 2020, DRN may treat the lack of response as a denial. *See Exhibit E.* The EPA did not respond to the communication or provide the documents by June 15, 2020. On June 22, 2020, DRN sent the EPA a courtesy email requesting that EPA respond to the September 2019 request. The EPA stated that it would “most likely be several more weeks before [they] can release the responsive records” and that the records would have to go through two more reviews, one by the FOIA Branch Chief and one by an attorney. *See Exhibit F.* The EPA further stated that they would send DRN the 29 documents that they are “releasing in full” within the “next couple of days” and that the 54 documents that are partially redacted still need additional review. *See Exhibit G.* On June 24, 2020, EPA sent DRN 29 documents without redactions, most of which were not responsive to DRN’s request.

Under FOIA law, the EPA is legally mandated to respond to a request for records within 20 working days from the date that the request was received, unless unusual or exceptional circumstances exist. 5 USCA § 552(6)(A); 5 USCA § 552(6)(B)(i). Unusual circumstances exist where EPA needs to collect responsive records from field offices; the request involves a “voluminous” amount of records; or the agency must consult with another agency which has a substantial interest in the responsive material or with two or more other offices of the EPA. 5 U.S.C.A. § 552(B)(iii). When unusual circumstances exist, EPA may extend the response time for an additional ten working days. 5 U.S.C.A. § 552(B)(i). In “unusual circumstances,” an agency may delay its response to a FOIA request or appeal, but must provide notice and must also provide “the date on which a determination is expected to be dispatched.” 5 U.S.C.A. § 552(a)(6)(B).

Here, EPA has unreasonably failed to respond to DRN’s request despite being afforded 10-months’ worth of extensions and without asserting that unusual circumstances exist that accounted for the extreme delay. While EPA asserted that DRN’s request was “very complicated” and contained “many” documents that are “several hundreds of pages”, they have not explicitly asserted that these reasons constitute unusual circumstances. Instead, EPA has only provided veiled and vague reasoning to explain their unnecessary and egregious delay.

EPA’s failure to abide by FOIA law is also evidenced by their refusal to provide a concrete and definitive date on which a determination is expected to be dispatched as required by 5 U.S.C.A. § 552(a)(6)(B). In June 2020, EPA stated that it would “most likely be several more weeks before [they] can release the responsive records” and that the records would have to go through two more reviews, one by the

FOIA Branch Chief and one by an attorney. Yet, in April 2020 EPA asserted the same reasoning: that the FOIA was entering the final review pending review by a “supervisor and legal staff”.

Notably, EPA has admitted that the total production only contained 83 documents, 53 of which have not yet been released to DRN. A review of 83 documents should not be sufficient to trigger a finding that unusual circumstances exist. Even if unusual circumstances existed, it is not reasonable for the review of 83 documents to take ten months or more. Notably, FOIA law allows 10 working days to be added where unusual circumstances exist, not ten months.

Further, DRN noted that the 29 records released by the EPA to DRN were not responsive to DRN’s request. DRN believes that EPA has additional records that it failed to produce and that they are located in the EPA’s Region 3 office. DRN’s September 2019 FOIA request included all documents and communications related to a complaint made by John Preston. The already-released documents do not contain any such information. Moreover, the documents included older documents that were not in the requested time frame (2005 – 2019).² To the extent that some documents are not responsive and DRN has not obtained the remaining document, DRN also asserts that EPA conducted an inadequate search despite being given the aforesaid numerous extensions. EPA is well aware that this FOIA is related to a litigation and as such, their delay is in bad faith.

Courts have generally found that a ten-month delay constitutes improper withholding of records. *See Gilmore v. U.S. Dept. of Energy*, 33 F.Supp.2d 1184 (N.D. Cal. 1998) (where Agency’s failure to respond to a Freedom of Information Act request for almost six months constituted improper withholding of records); *also see Oregon Natural Desert Ass’n v. Gutierrez*, 409 F.Supp.2d 1237 (D. Or. 2006) (where Agency’s failure to respond to a Freedom of Information Act request for eight months constituted improper withholding of records). Moreover, in 2019, the EPA averaged 150.39 days (5 months) to respond to perfected and processed “complex” FOIA requests. *See United States Environmental Protection Agency Freedom of Information Act Annual Report for the 2019 Fiscal Year*.

DRN respectfully requests that the Inspector General hold that EPA violated the FOIA law where they failed to timely and sufficiently respond to DRN’s request. Based upon the foregoing, we respectfully request that you require EPA to immediately release the FOIA records to DRN. Due to the ongoing pandemic, DRN requests that all correspondence and communication be emailed to paola@delawariverkeeper.org.

Thank you for your consideration.

Sincerely,

Paola Toro
Staff Attorney
Delaware Riverkeeper Network
925 Canal Street
Bristol, PA 19007
paola@delawariverkeeper.org

Dated: July 28, 2020

² Due to the slow and inadequate response, DRN requests that an updated search be performed to capture any documents between September 2019 and the response date.

EXHIBIT A



September 3, 2019

US Environmental Protection Agency
Region 3
1650 Arch St.
Philadelphia, PA 19103

Sent Via Online Form

RE: Freedom of Information Act ("FOIA") Request for Records of the US Environmental Protection Agency concerning the "Bishop Tube Site" from January 1, 2005 to September 3, 2019.

Dear Sir/Madam:

On behalf of the Delaware Riverkeeper Network (DRN), and pursuant to the Freedom of Information Act ("FOIA"), enclosed please find a request for copies of all records in the EPA's possession regarding the Bishop Tube Site located at 1 Malin Road, Malvern, PA from January 1, 2005 to September 3, 2019, including all correspondence, reports, studies, documents, internal and external communications, and emails between the Department of Environmental Protection and the Environmental Protection Agency, and specifically relating to a complaint sent by resident "John Preston" to the EPA regarding the Bishop Tube Site, including all documents, internal and external communications and emails between the concerned resident, the Department of Environmental Protection, and the Environmental Protection Agency. This request includes all attachments mentioned in any documents.

If other records exist in your possession not specifically mentioned above, but pertain to this request, we intend those to be within the scope of this request.

I also request a waiver of any fees associated with a response to this request. Pursuant to 5 U.S.C. 552(a)(4)(A)(iii) of FOIA, documents obtained in the interest of the public fall under the fee waiver category because furnishing these documents is likely to contribute significantly to public understanding of the operations or activities of the Agency. The Delaware Riverkeeper Network ("DRN") is a nonprofit organization that speaks on behalf of the public and will use the records in a way that serves the public interest.

DRN champions the rights of people to a clean and healthy environment, which includes the land

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215) 369-1181
dm@delawareriverkeeper.org
www.delawareriverkeeper.org

use, water pollution and the long-term damage caused by all forms of coastal and shoreline development. DRN gives voice, strength, and protection to the communities and waterways of the State of Pennsylvania, New Jersey, New York and Delaware. Through independent advocacy, and the use of accurate facts, science, and law, DRN works to ensure the rich and healthy future that can only exist with a clean, healthy, and free-flowing river system.

DRN is unique in that it is founded upon the expectation of personal and community responsibility for river protection, as personified by the Delaware Riverkeeper. DRN is the only grassroots advocacy organization that operates watershed-wide and empowers communities with the engaged interaction and information needed to succeed in protecting rivers (which includes all of the land that drains into the rivers) and the environment now and into the future.

DRN is a 501(c)(3) non-profit public interest organization and has no commercial interest in the disclosure of the requested information or in the Project. DRN does not seek the requested information to further any commercial, trade, or profit interest of the organization. Therefore, DRN has met the statutory and regulatory standards as having a non-commercial interest in the requested records.

For the foregoing reasons, DRN has satisfied the statutory and regulatory requirements for receiving a fee waiver under 5 U.S.C. §552(a)(4)(A)(iii) and 49 CFR §7.43. DRN is thus entitled to the full grant of such waiver for its FOIA request pertaining to the Bishop Tube Site.

If my fee request is denied, I request that you contact me to discuss the costs for searching or copying the records before you fulfill my request.

If you deny all or any part of this request, please provide a listing of the information in the file and cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law. If you have any questions about handling this request, you may contact me at (215) 369-1188, or Molly Atz at molly@delawareriverkeeper.org.

Thank you in advance for your cooperation with this request.

Sincerely,



Maya K. van Rossum
the Delaware Riverkeeper

EXHIBIT B

Paola Toro

To: Deanna Tanner
Subject: RE: Bishop Tube FOIA

From: Johnson, Larry-C [<mailto:Johnson.Larry-C@epa.gov>]
Sent: Monday, November 25, 2019 1:36 PM
To: Deanna Tanner <Deanna@delawareriverkeeper.org>
Subject: Bishop Tube FOIA

Deanna,

Per our phone conversation, I am recommending that we extend the due date for this FOIA request to Dec 13, 2019 and that we have an agreement to increase the fee limit to \$350.00.

Also, please accept our recommendation that we combine the two FOIA requests into one.

Please indicate in your response if this is agreeable to you and your organization. We are currently reviewing documents harvested for this request and should have them through processing in the timeframe that we have discussed.

Thank you for your time and conversation

Respectfully,

Larry Johnson
FOIA Project Manager
USEPA Region 3
215-814-3239

EXHIBIT C

Paola Toro

To: Deanna Tanner
Subject: RE: Bishop Tube FOIA

From: Deanna Tanner <Deanna@delawariverkeeper.org>
Sent: Monday, April 20, 2020 11:56 AM
To: Johnson, Larry-C <Johnson.Larry-C@epa.gov>
Subject: RE: Bishop Tube FOIA

Thanks for the update and your efforts. We could agree to the additional month if you confirm that we remain in agreement about the \$350 maximum costs to DRN. I was concerned by the letter I received "denying" our fee waiver when we had actually agreed already to a fee limit. I do not want the documents further held up for financial reasons. Please let me know if you can help clarify this from your end and can reconfirm our fee agreement for document production. If so, we will await documents by no later than 5/17/20. Please respond to this email by no later than Thursday so that we know we are in agreement.

Thanks,
Dee Tanner

From: Johnson, Larry-C [<mailto:Johnson.Larry-C@epa.gov>]
Sent: Friday, April 17, 2020 3:40 PM
To: Deanna Tanner <Deanna@delawariverkeeper.org>
Subject: RE: Bishop Tube FOIA

Counselor,

As it happens, we've just finished our second review of the documents for Bishop Tube. I've submitted that to my supervisor for final review and once he has completed his overview we'll submit it for review by our legal staff.

We'd like for you to consider providing us with a 1 month extension from today's date so that we can finalize the release of these documents.

I'm sorry for the delay, but this has been a very complicated request to fulfill.

Please do not hesitate to contact me if you have further questions.

Larry Johnson

FOIA Project Manager
USEPA Region 3
215-814-3239

From: Deanna Tanner <Deanna@delawariverkeeper.org>
Sent: Friday, April 17, 2020 3:14 PM
To: Johnson, Larry-C <Johnson.Larry-C@epa.gov>
Subject: RE: Bishop Tube FOIA

Hi Larry:

I hope you are well. I am a bit perplexed because I agreed to your below fee limit back in December and we just got a letter in the mail denying our request for a fee waiver. I don't recall getting the documents. Please let me know what has happened with our request.

Dee

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Larry Johnson
FOIA Project Manager
USEPA Region 3
215-814-3239

EXHIBIT D

Paola Toro

To: Deanna Tanner
Subject: RE: Bishop Tube FOIA

From: Deanna Tanner
Sent: Monday, May 4, 2020 11:31 AM
To: Johnson, Larry-C <Johnson.Larry-C@epa.gov>
Subject: RE: Bishop Tube FOIA

That is fine if we can be sure that it will be completed on or before May 30th. Wishing you good health! Thanks!

Dee

From: Johnson, Larry-C [<mailto:Johnson.Larry-C@epa.gov>]
Sent: Monday, May 4, 2020 11:19 AM
To: Deanna Tanner <Deanna@delawareriverkeeper.org>
Subject: RE: Bishop Tube FOIA

Counselor,

Sorry for the delay in responding. There will be no issue with the fees, the fee waiver denial comes from the National FOIA office and follows a prescribed regimen for approval and denials. That being said, because of the protracted nature of this response, I do not believe that any fee issues will arise.

Document production is completed and review by the subject matter expert is done. Now we must complete quality control and legal review (final review for CBI and PII) before final release. An extension until May 30 would most likely be prudent. Please indicate in your response to this email that you agree to the proposed extension.

Please contact me if you have any further questions or concerns.

Larry Johnson
FOIA Project Manager
USEPA Region 3
215-814-3239

From: Deanna Tanner <Deanna@delawareriverkeeper.org>
Sent: Monday, April 20, 2020 11:56 AM
To: Johnson, Larry-C <Johnson.Larry-C@epa.gov>
Subject: RE: Bishop Tube FOIA

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Larry Johnson
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Thank you for your time and conversation

Respectfully,

Larry Johnson
FOIA Project Manager

USEPA Region 3
215-814-3239

EXHIBIT E

Paola Toro

To: 'mccray.pamela@epa.gov'
Subject: RE: Bishop Tube FOIA

From: Paola Toro
Sent: Thursday, May 28, 2020 11:55 AM
To: 'mccray.pamela@epa.gov' <mccray.pamela@epa.gov>
Subject: RE: Bishop Tube FOIA

Good Afternoon Ms. McCray,

I appreciate EPA's efforts to complete our request. However, we are unable to agree to another lengthy extension. We have been awaiting EPA's response since October and have already agreed to multiple extensions since that date. Please submit an answer to our request by June 15, 2020. If we do not hear from you by then, we may choose to treat your lack of response as a denial and appeal. Please do not hesitate to contact me with any questions.

Thanks,
Paola Toro
Staff Attorney
Delaware Riverkeeper Network
925 Canal St.
Bristol, PA 19007

Phone: 215-369-1188 ext 107

<https://www.delawareriverkeeper.org/>

New from the Delaware Riverkeeper Maya van Rossum, *The Green Amendment, Securing our Right to a Healthy Environment*. Order at: <http://bit.ly/TheGreenAmendment>. All proceeds benefit the Delaware Riverkeeper Network.

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From: McCray, Pamela [<mailto:MCCRAY.PAMELA@EPA.GOV>]
Sent: Wednesday, May 27, 2020 3:12 PM
To: Deanna Tanner <Deanna@delawareriverkeeper.org>
Subject: RE: Bishop Tube FOIA

Good Afternoon Ms. Tanner,

I apologize for the delay in processing your request. We are working very hard to complete your request. The review process is almost done and we will be able to release responsive records soon. Please give us another extension until June 30, 2020 to finalize your request.

Please respond to this email if you agree to the extension.

Thanks you in advance and stay safe,

Pamela McCray

Government Information Specialist

U.S. Environmental Protection Agency, Region III

Office of Regional Counsel – FOIA Branch (3RC70)

1650 Arch Street

Philadelphia, PA 19103

215-814-2671 (office)

215-814-3062 (fax)

email: mccray.pamela@epa.gov

EXHIBIT F

Paola Toro

To: D'Andrea, Michael
Cc: McCray, Pamela
Subject: RE: Bishop Tube FOIA

From: D'Andrea, Michael <DANDREA.MICHAEL@EPA.GOV>
Sent: Monday, June 22, 2020 10:11 AM
To: Paola Toro <Paola@delawariverkeeper.org>
Cc: McCray, Pamela <MCCRAY.PAMELA@EPA.GOV>
Subject: FW: Bishop Tube FOIA

Mr. Toro:

Thank you for your email and regarding your FOIA request seeking information on Bishop Tube. I sincerely apologize for the delay in getting you the information you requested.

Unfortunately, it will most likely be several more weeks before we can release the responsive records. The records, of which there are many, have to go through two more reviews, one from me as the FOIA Branch Chief and then one final review by an attorney.

You have been more than patient and understanding with our process and again, I apologize for the delay.

If you would like to discuss your FOIA further, please contact me at the number below (which will forward to my cell phone) or you can call me directly on my cell at 267-474-0155.

Mike

Michael M. D'Andrea
Chief, FOIA Branch
U.S. EPA Region 3 – Mid-Atlantic
215-814-5615



From: Paola Toro <Paola@delawariverkeeper.org>
Sent: Monday, June 22, 2020 9:39 AM
To: McCray, Pamela <MCCRAY.PAMELA@EPA.GOV>
Subject: RE: Bishop Tube FOIA

Good Morning,

It is past the June 15th deadline that DRN agreed to concerning our October 2019 FOIA request. Can you provide me with an update as to whether the documents are ready for production? Thank you in advance.

Sincerely,

Paola Toro
Staff Attorney
Delaware Riverkeeper Network
925 Canal St.
Bristol, PA 19007

Phone: 215-369-1188 ext 107

<https://www.delawareriverkeeper.org/>

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From: Paola Toro
Sent: Thursday, May 28, 2020 11:55 AM
To: 'mccray.pamela@epa.gov' <mccray.pamela@epa.gov>
Subject: RE: Bishop Tube FOIA

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Staff Attorney
Delaware Riverkeeper Network
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Thanks you in advance and stay safe,

Pamela McCray

Government Information Specialist

U.S. Environmental Protection Agency, Region III

Office of Regional Counsel – FOIA Branch (3RC70)

1650 Arch Street

Philadelphia, PA 19103

215-814-2671 (office)

215-814-3062 (fax)

email: mccray.pamela@epa.gov

EXHIBIT G

Paola Toro

To: D'Andrea, Michael
Cc: McCray, Pamela
Subject: RE: Bishop Tube FOIA

From: D'Andrea, Michael <DANDREA.MICHAEL@EPA.GOV>
Sent: Monday, June 22, 2020 10:55 AM
To: Paola Toro <Paola@delawariverkeeper.org>
Cc: McCray, Pamela <MCCRAY.PAMELA@EPA.GOV>
Subject: RE: Bishop Tube FOIA

Mr. Toro:

In the next couple days we can get you all of the documents that we are “releasing in full” (meaning there are no redacted or withheld portions).

There are 29 of these documents. There are currently 54 documents that we anticipate will be released partially redacted. Many of these documents are several hundred pages long and they are the documents that need additional review.

Again, thank you for your patience. Please contact me if you wish further discuss your FOIA.

Mike

Michael M. D'Andrea
Chief, FOIA Branch
U.S. EPA Region 3 – Mid-Atlantic
215-814-5615



From: D'Andrea, Michael
Sent: Monday, June 22, 2020 10:11 AM
To: Paola@delawariverkeeper.org
Cc: McCray, Pamela <MCCRAY.PAMELA@EPA.GOV>
Subject: FW: Bishop Tube FOIA

Mr. Toro:

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Mike

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Chief, FOIA Branch
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Phone: 215-369-1188 ext 107

<https://www.delawareriverkeeper.org/>

New from the Delaware Riverkeeper Maya van Rossum, *The Green Amendment, Securing our Right to a Healthy Environment*. Order at: <http://bit.ly/TheGreenAmendment>. All proceeds benefit the Delaware Riverkeeper Network.

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From: Paola Toro
Sent: Thursday, May 28, 2020 11:55 AM
To: 'mccray.pamela@epa.gov' <mccray.pamela@epa.gov>
Subject: RE: Bishop Tube FOIA

Good Afternoon Ms. McCray,

I appreciate EPA's efforts to complete our request. However, we are unable to agree to another lengthy extension. We have been awaiting EPA's response since October and have already agreed to multiple extensions since that date. Please submit an answer to our request by June 15, 2020. If we do not hear from you by then, we may choose to treat your lack of response as a denial and appeal. Please do not hesitate to contact me with any questions.

Thanks,
Paola Toro
Staff Attorney
Delaware Riverkeeper Network
925 Canal St.
Bristol, PA 19007

Phone: 215-369-1188 ext 107

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From: McCray, Pamela [<mailto:MCCRAY.PAMELA@EPA.GOV>]
Sent: Wednesday, May 27, 2020 3:12 PM
To: Deanna Tanner <Deanna@delawareriverkeeper.org>
Subject: RE: Bishop Tube FOIA

Good Afternoon Ms. Tanner,

I apologize for the delay in processing your request. We are working very hard to complete your request. The review process is almost done and we will be able to release responsive records soon. Please give us another extension until June 30, 2020 to finalize your request.

Please respond to this email if you agree to the extension.

Thanks you in advance and stay safe,

Pamela McCray

Government Information Specialist

U.S. Environmental Protection Agency, Region III

Office of Regional Counsel – FOIA Branch (3RC70)

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Philadelphia, PA 19103

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